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Supreme Court of the United States
OCTOBER TERM, 1993

UNITED STATES OF AMERICA,
Petitioner,

v.

ALFONSO LOPEZ, JR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF 16 MEMBERS OF THE UNITED STATES SENATE AND 34 MEMBERS OF THE UNITED STATES HOUSE OF REPRESENTATIVES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER †

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BRIEF OF 16 MEMBERS OF THE UNITED STATES SENATE AND 34 MEMBERS OF THE UNITED STATES HOUSE OF REPRESENTATIVES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE* [1]

Amici curiae are a bipartisan group of 16 members of the United States Senate and 34 members of the United States House of Representatives.[2] *Amici* have dual interests in this Court's review of the Court of Appeals' decision in *United States v. Lopez*, 2 F.3d 1342 (5th Cir. 1993), *cert. granted*, 62 U.S.L.W. 3690 (1994). First, they have an institutional interest in the procedural requirements for enacting constitutionally sound legislation. They ada-

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[1] Both petitioner and respondent have consented to the filing of this brief. Letters of consent are on file with the Clerk of the Court.

[2] Individual *amici* are listed on the inside cover of this brief.

mantly disagree with the Fifth Circuit's suggestion that Congress must make specific findings that legislation affects interstate commerce before Congress can exercise its power under the Commerce Clause of the United States Constitution.

Second, *amici* have a substantive interest here because the *Lopez* decision threatens Congress's ability to respond effectively to violent crime and the proliferation of illegal firearms. Over the past few years, Congress and the President have made crime prevention and punishment a first-order priority of the federal government. The *Lopez* decision suggests, however, that there are severe constitutional limits on the federal government's ability to enact legislation that addresses the national problems of crime and deadly weapons. The ramifications of the *Lopez* decision stretch far beyond the Gun-Free School Zones Act ("the Act"), held unconstitutional in *Lopez*, potentially affecting a wide range of federal crime control measures.

If the decision in *Lopez* were to stand, Congress will face significant burdens every time it enacts legislation—burdens simply not imposed by the Constitution. Indeed, the *Lopez* decision may seriously undermine the omnibus anticrime bill (H.R. 3355) now pending before a House-Senate conference committee. Ultimately, *Lopez* would prevent Congress from comprehensively addressing crime, an issue that clearly and substantially affects interstate commerce—and the national interest.

The U.S. Court of Appeals for the Ninth Circuit has held that the Act "represents a permissible exercise of Congressional authority under the Commerce Clause." *United States v. Edwards*, 13 F.3d 291, 292 (9th Cir. 1993).[3] *Amici* fully agree. With the United States, accord-

[3] The Ninth Circuit's analysis has been followed in *United States v. Glover*, 842 F. Supp. 1327 (D. Kan. 1994), and *United States v. Ornelas*, 841 F. Supp. 1087 (D. Colo. 1994). Another district court reached the same conclusion shortly before the Ninth Circuit released its decision in *Edwards*. *See United States v. Holland*, 841 F. Supp. 143 (E.D. Pa. 1993).

ingly, they ask this Court to reverse the Fifth Circuit's decision in *Lopez*.

SUMMARY OF ARGUMENT

Congress enacted the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q), to respond to the growing scourge of violence in the high schools and even the grade schools of this country. The law prohibits the possession of firearms within 1,000 feet of a school. As the U.S. Court of Appeals for the Ninth Circuit correctly held, Congress had the authority to pass the legislation, under the broad mandate of the Commerce Clause, without colliding with the Tenth Amendment's reservation of rights to the states.

The court below fundamentally erred. It held the Act unconstitutional—in part because Congress had failed to make specific findings of fact to establish a relationship between interstate commerce and armed violence in the schools, and in part because Congress failed to state that it was exercising its powers pursuant to the Commerce Clause. Yet Congress has regulated interstate commerce in weapons, with and without specific findings, since at least 1934 when it prohibited the possession of unregistered sawed-off shotguns and machine guns. There long has been federal legislation regulating the transportation, possession and use of firearms—to the point, indeed, that this Court has sanctioned a federal law that regulates the redemption of firearms from local pawnshops because of its impact on interstate commerce. Neither the Commerce Clause nor the decisions of this Court, moreover, require Congress expressly to invoke that Clause or to find, as fact, each time that it legislates that a particular bill implicates interstate commerce. Rather, the only appropriate question is whether Congress could have found that the actions proscribed by Section 922(q) substantially affect commerce "among the several States." The obvious answer is "yes."

There is overwhelming evidence that the interstate traffic in guns by criminals contributes directly to the national problems of drugs and violence that, in turn, now threaten this country's commitment to elementary and secondary education. Thirty years ago, without the benefit of congressional findings, this Court acknowledged the "burdens that discrimination by race" place on interstate commerce and rejected a Commerce Clause challenge to Title II of the Civil Rights Act of 1964. Today, no less, armed conflict in the schools is not merely a "local" problem that Congress may decry but is powerless to address. While the courts ultimately determine whether activity regulated by Congress comes within the reach of the commerce power, *United States v. Darby,* 312 U.S. 100 (1941), the Fifth Circuit either ignored or seriously misapprehended this Court's precedent. The court below redefined the "rational basis" standard under which this Court traditionally has upheld statutes resting on the Commerce Clause and imposed novel fact-finding burdens on Congress that dramatically change the institutional relationship between Congress and the federal courts. This Court should reverse the decision below and uphold the constitutionality of the Gun-Free School Zones Act.

ARGUMENT

The U.S. Department of Justice has just reported that people armed with handguns committed a record 930,700 violent crimes in 1992. *See* Bill McAllister, *Handgun Crime Up Sharply,* Wash. Post, May 16, 1994, at A1. The problem of gun violence is particularly prevalent among young people. *See generally Children Carrying Weapons: Why the Recent Increase: Hearing Before the Senate Committee on the Judiciary,* 102d Cong., 2d Sess. (1992). Disturbingly, though perhaps not surprisingly, gun possession has spread into the schools.

According to the National Education Association, more than 100,000 students carry guns to school every day. *See id.* at 6 (statement of Sen. Kohl); Elizabeth Birge, *5 Year-Old Fires Gun at School,* Chi. Trib., Jan. 9, 1994, Chicagoland sec. at 3. In 1987, more than a quarter of a million students carried a handgun to school at least once. *See Gun-Free School Zones Act of 1990: Hearings on H.R. 3757 Before the Subcommittee on Crime of the House Committee on the Judiciary,* 101st Cong., 2d Sess. 7 (1990) (statement of Rep. Feighan). The problem is national, affecting urban, suburban and rural areas alike. *See Children and Gun Violence: Hearings on S. 1087 Before the Subcommittee on Juvenile Justice of the Senate Committee on the Judiciary,* 103d Cong., 1st Sess. 2 (1993) (statement of Sen. Kohl).

The prevalence of guns in schools is directly related to their accessibility. A 1992 study in the *Journal of the American Medical Association* found that 34 percent of Seattle's public high school students reported easy access to handguns, with 6.4 percent actually owning a handgun. These same students reported a high rate of firearm experiences: one in every three student gun owners admitted that they actually had fired a gun at someone, and six percent of all male students reported carrying a handgun to school. Charles M. Callahan and Frederick P. Rivara,

Urban High School Youth and Handguns: A School-based Survey, 267 J. Am. Med. Ass'n 3038 (June 10, 1992).

The proliferation of handguns has made firearm injuries among young people a national tragedy. Gun injuries are now one of the leading causes of death for young people. *Id.* In 1988, firearms accounted for 20 percent of all deaths among 15- to 24-year olds. *Id.* Over three fourths of adolescent homicides and slightly more than half of all adolescent suicides are firearm related—a majority of these, the result of handguns. *Id.*

The Gun-Free School Zones Act, 18 U.S.C. § 922(q), represents the first effort to address the growing crisis of guns in schools and the related problems of drugs and gang activity. Adopted in 1990 as part of the Crime Control Act, the law prohibits the possession of a firearm within 1,000 feet of the grounds of a school. But much preceded this first step. In numerous hearings held over the years on the escalating problem of violent crime across the nation, Congress consistently has found a direct link between firearms and interstate commerce.

I. CONGRESS NEED NOT MAKE PARTICULARIZED FINDINGS REGARDING THE EFFECT OF A STATUTE ON INTERSTATE COMMERCE IN ORDER TO EXERCISE LEGISLATIVE POWER UNDER THE COMMERCE CLAUSE.

A statute grounded on the Commerce Clause is constitutional if "Congress had a rational basis for finding that [the regulated activity] affected [interstate] commerce." *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964). This Court has long held, moreover, that when legislating under the Commerce Clause, Congress need not make express, particularized findings. *See, e.g., Perez v. United States*, 402 U.S. 146, 156 (1971) ("We have mentioned in detail the economic, financial, and social setting of the problem as revealed to Congress. We do so

not to infer that Congress need make particularized findings in order to legislate.") (emphasis added); *see also Katzenbach v. McClung*, 379 U.S. 294, 299 (1964) (noting, with respect to the civil rights statute at issue in *Heart of Atlanta Motel*, that "no formal findings were made, which of course are not necessary").

The demand by the court below for specific legislative findings conflicts with this Court's repeated declarations that the rational basis standard does not require Congress to make *any* findings to justify its actions. In equal protection cases, for example, the Court will uphold a legislative classification "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *F.C.C. v. Beach Communications, Inc.*, —— U.S. ——, 113 S. Ct. 2096, 2101 (1993). For that reason, the Court "never require[s] a legislature to articulate its reasons for enacting a statute . . .," *id.* at 2102, and "the absence of 'legislative facts' explaining the distinction '[o]n the record,' . . . has no significance in rational-basis analysis." *Id.* Legislative judgments may simply "be based on rational speculation unsupported by evidence or empirical data." *Id.* The Court should accord no less deference in determining whether Congress had a rational basis for exercising its commerce power here.

Of course, if congressional findings are made, they carry great weight. *See United States v. Evans*, 928 F.2d 858, 862 (9th Cir. 1991); *see also Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 276 (1981); *Katzenbach*, 379 U.S. at 304. Even the court below conceded that "[w]here Congress has made findings . . . that [the] regulated activity substantially affects interstate commerce, the courts must defer 'if there is any rational basis for' the finding." *Lopez*, 2 F.3d at 1363 (quoting *Preseault v. I.C.C.*, 494 U.S. 1, 17 (1990)).[4] The

[4] The court also observed that "[p]ractically speaking, such findings almost always end the matter," noting that no decision of this Court has set aside such a finding as without a rational basis in

court below erred, however, in concluding that courts may rely only on the legislative history of the particular statute in question to provide those findings. *Lopez*, 2 F.3d at 1359-60.

Rather, there is an indispensable corollary to the principle that Congress's findings carry great weight: courts may consider the history of other legislation regulating the same class of activities. Justice Powell explained this principle in *Fullilove v. Klutznick*, 448 U.S. 448 (1980): "After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area." *Id.* at 503. Moreover, the common-sense concept that earlier legislative findings can support subsequent enactments—and that Congress, therefore, need not revisit the same issues each time it legislates—avoids unnecessary expenditure of the legislature's time and hence the public's resources.

The Tenth Circuit followed this approach in *United States v. Lane*, 883 F.2d 1484 (10th Cir. 1989), *cert. denied*, 493 U.S. 1059 (1990), a challenge to 18 U.S.C. § 245(b)(2)(c), which criminalized interference with applications for private employment because of race, color, religion, or national origin. The defendants argued that the statute had not been validly enacted pursuant to Congress's commerce power because there had been no legis-

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the last half century. *Id.* at 1363 n.43. Oddly, the *Lopez* court drew the inconsistent if not illogical conclusion that findings are *necessary* for judicial review.

In effect, the court below treated Congress's failure to make a finding that it has constitutional authority to enact a particular statute as tantamount to an affirmative finding that it lacks that authority. Such a rule could represent a serious encroachment on the role of the judiciary under *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). The final determination of the *power* of Congress—as opposed to its intent—to regulate under the Commerce Clause is a matter within the exclusive province of this Court.

lative findings regarding the effect of racial discrimination on interstate commerce. *Lane* at 1487, 1492. The court declared, however, that "Congress is not required to make 'particularized findings in order to legislate.'" *Id.* at 1492 (quoting *Perez*, 402 U.S. at 156). Although Congress had made no findings in 1988 when it enacted Section 245, it already had "heard extensive evidence on the burdens that racial discrimination places on interstate commerce in connection with its enactment of the Civil Rights Act of 1964." *Id.*; *see also United States v. Hale*, 978 F.2d 1016 (8th Cir. 1992) (while Congress made no interstate commerce findings in 1986 when it enacted 18 U.S.C. § 922(o), regulating possession of machine guns, it made ample findings in 1968 on the nexus between firearms and interstate commerce), *cert. denied*, 113 S. Ct. 1614 (1993). Quite simply, the "rational basis" for a particular statute need not emanate from the legislative history of that statute.

Ignoring these principles, the court below suggested that *United States v. Bass*, 404 U.S. 336 (1971), stands for the proposition that Congress must clearly express its intent to legislate under the Commerce Clause by making interstate commerce findings in the particular statute at issue. *Lopez*, 2 F.3d at 1347, 1365 n.48. In *Bass*, the Court analyzed a federal law imposing penalties on a felon who "receives, possesses, or transports *in commerce or affecting commerce* . . . any firearm." *See* former 18 U.S.C. § 1202(a) (emphasis added). The defendant had been convicted for possession of firearms *without* proof that the possession took place in or affected commerce. The issue for the Court was a matter of statutory construction: does the language "in commerce or affecting commerce" modify "receives" and "possesses" as well as "transports." *Bass*, 404 U.S. at 339-42.

The Court found both the statutory language and the legislative history inadequate to determine congressional intent. *Id.* Accordingly, invoking the rule of lenity, the

Court read the provision narrowly to favor the defendant. It concluded that the defendant could be convicted only upon a specific showing of a nexus between his possession of a firearm and interstate commerce. *Id.* at 347.[5]

Unlike the statute at issue in *Bass*, however, Section 922(q) does not require proof of a factual nexus between the possession of a firearm in a school zone and interstate commerce as an element of the crime. *See United States v. Nelson*, 458 F.2d 556, 559 (5th Cir. 1972) (rejecting similar *Bass* challenge to Gun Control Act of 1968); *United States v. Lehman*, 464 F.2d 68, 73 n.11 (5th Cir.), *cert. denied*, 409 U.S. 950 (1972) (same); *United States v. Crandall*, 453 F.2d 1216 (1st Cir. 1972) (same). Nor is the language of Section 922(q) ambiguous. And, in any event, the Commerce Clause does not require that a criminal statute incorporate, as an element of the crime, a factual nexus between interstate commerce and the challenged conduct. *Huddleston v. United States*, 415 U.S. 814, 833 (1974).

The court below also required a specific legislative invocation of the Commerce Clause "to demonstrate that [Congress's] exercise of power is within the scope of the Commerce Clause." *Lopez*, 2 F.3d at 1365-66. This requirement, invented out of whole cloth, has no basis in the Constitution or in this Court's jurisprudence. Congress need not expressly invoke the Commerce Clause as the source of its power. *See EEOC v. Wyoming*, 460 U.S. 226, 243-44 n.18 (1983) ("'The . . . constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.'") (quoting *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948)); *see also supra* at 7 and n.4.

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[5] Moreover, the Court noted, Congress had in fact made findings in the legislation that would have supported the validity of a pure gun possession statute under the Commerce Clause. 404 U.S. at 346 n.14. These findings are discussed in further detail in Section II below.

In sum, where legislators have a rational basis for concluding that a chosen regulatory scheme is necessary to the protection of commerce, the Court's investigation is at an end. *See Katzenbach*, 379 U.S. at 303-05.[6] The Court's review is traditionally conducted in a highly deferential manner, *Hodel*, 452 U.S. at 276,[7] particularly when Congress has made findings that the regulated conduct substantially affects interstate commerce. *Preseault*, 494 U.S. at 17. Notwithstanding the *Lopez* court's assertion to the contrary, 2 F.3d at 1366, Congress repeatedly has made explicit findings on the many ways in which violent crime and illegal gun possession imperil the nation's economy and, by definition, affect interstate commerce. These findings form a legitimate, rational basis for the regulation at issue here.

II. THERE IS A STRONG FEDERAL INTEREST IN CRIME PREVENTION AND THE INTERSTATE TRAFFIC IN GUNS.

The Fifth Circuit's opinion below questioned the federal government's interest in crime prevention and, specifically, the possession of guns within 1,000 feet of a school. *Lopez*, 2 F.3d at 1366-67. The opinion also suggested that Congress may only enact legislation that directly or indirectly regulates interstate crime or the actual flow of firearms across state lines. Finally, the Fifth Circuit concluded that Congress has made no specific findings about the relationship between the possession of guns and interstate commerce, expressing doubt that any relationship exists. *Id.* at 1364-68. On each of these points, the Court of Appeals was wrong.

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[6] Even the *Lopez* court conceded that the determination of a rational basis for legislation is "peculiarly within the province of Congress, rather than the Courts." *Lopez*, 2 F.3d at 1362.

[7] In *Hodel*, this Court flatly rejected the argument that the "rational basis" test should not apply if the activity being regulated is arguably purely local in character. *Hodel*, 452 U.S. at 281.

Juvenile crime and, particularly, drug use and gang violence in the schools have become some of the most important issues facing the country today. To the extent that the Fifth Circuit suggested that crime is purely a local concern, the court was gravely mistaken. To the extent that the Fifth Circuit suggested that federal weapons legislation must directly affect commerce in weapons, it was also mistaken. While legislation enacted pursuant to the Commerce Clause must have a substantial effect on interstate commerce, that effect need not be directy attributable to the precise activity regulated by the statute. *See, e.g., Hodel*, 452 U.S. 264 (Congress may regulate mining if it substantially affects interstate commerce by destroying fish and wildlife). "As interstate commerce has become ubiquitous, activities once considered purely local have come to have effects on the national economy, and have accordingly come within the scope of Congress's commerce power." *New York v. United States*, —— U.S. ——, 112 S. Ct. 2408, 2419 (1992). Thus, if federal crime prevention legislation has a substantial effect on *any* aspect of interstate commerce, it is permissible under the Commerce Clause.

The prevalence of crime, the possession of firearms and the presence of weapons in schools are all directly related and they all substantially affect interstate commerce—both commerce in firearms as well as other significant interstate commerce concerns. Moreover, although not constitutionally required, there already are substantial congressional findings that provide a Commerce Clause basis for upholding the constitutionality of Section 922(q).

A. Crime Seriously Affects Interstate Commerce.

On October 1, 1992, Senator Kohl made the following observations in his opening remarks to the Senate Judiciary Committee hearing on "Children Carrying Weapons":

> With gang, drug and other criminal activity on the rise, it's clear that we are becoming a more violent society. We need to control the flow of weapons that are falling into the wrong hands—including the hands of youngsters. We need to keep our children safe in our schools so they can learn to become productive adults and seek mature, rational ways to solve their problems. By allowing guns in schools and allowing youngsters to live in fear of their lives on a daily basis, we're not offering them much hope for the future.

Children Carrying Weapons, at 8 (statement of Sen. Kohl). Although national significance alone does not necessarily give Congress constitutional authority to legislate, the substantial effects of crime on interstate commerce are all too apparent:

> In "A Community of Self-Reliance," [the American Enterprise Institute] profiles the crushing burden high crime rates place on the business activity depressed areas need so badly: "Crime lowers property values, making it harder for the urban poor to accumulate capital and to borrow money. Crime is one of the major reasons why businesses in central cities restrict operations, relocate, sell, or close down. Businesses in high crime areas face sharply higher operating costs, including higher labor costs and investments in a security force, improved lighting, alarms, metal grills for windows and doors, and—if available at all—extremely expensive insurance." In other words, burglars and violent criminals have at times established a blockade between the residents of poor communities and the jobs they so desparately need.

133 Cong. Rec. H1778 (daily ed. Apr. 2, 1987) (statement of Rep. Lungren).

Congress and the courts have noted, for example, the direct connection between crime and rising insurance rates. *Compare* 138 Cong. Rec. E1532 (daily ed. May 27, 1992) (statement of Rep. Hamilton) ("We pay the cost of crime in higher taxes, insurance rates and prices

for goods and services . . . .), *with Evans*, 928 F.2d at 862 (Congress may reasonably conclude that possession of firearms affects the national economy through the insurance industry). Crime also has a detrimental effect on urban revitalization. *See* 138 Cong. Rec. S15,041 (daily ed. Sept. 25, 1992) (statement of Sen. Lieberman) ("I think people understand at the core of the problems of urban America, which express themselves in crime and unrest, is the exit of manufacturing businesses.").

Perhaps crime's most striking effect on interstate commerce is its effect on business relocation decisions. In the words of Congressman Horn: "The connection between peace in the streets and economic growth is clear. As Richard Riordan, the . . . mayor of Los Angeles, has said, 'No business wants to locate in a war zone.'" 139 Cong. Rec. H3917 (daily ed. June 22, 1993) (statement of Rep. Horn). In *Katzenbach*, this Court recognized that Congress may regulate activities that affect industry relocation. The Court found an effect on interstate commerce because "discrimination deterred professional, as well as skilled, people from moving into areas where such practices occurred and thereby caused industry to be reluctant to establish there." 379 U.S. at 300.

The effects of crime on insurance, urban revitalization and business relocation are just a few of the ways in which crime substantially affects interstate commerce.[8]

B. The Possession of Guns Seriously Affects Interstate Commerce.

The court below was concerned that Section 922(q) criminalizes the "mere simple possession" of a gun by an individual. *Lopez*, 2 F.3d at 1348. Indeed, the *Lopez*

[8] Crime also has a significant effect on tourism. *See* 140 Cong. Rec. E739 (daily ed. Apr. 21, 1994) (statement of Rep. Gekas) ("[C]rimes against tourists must be addressed if the industry is to provide consumers with the most for their tourism dollar"); 140 Cong. Rec. H2362 (daily ed. Apr. 14, 1994) (statement of Rep. Owens) ("[I]f we do not talk about controlling guns, we . . . are endangering the tourism industry.").

decision's extensive review of federal gun legislation seemed designed to show the lack of congressional findings supporting a nexus between the "mere" possession of firearms and interstate commerce. Yet, in enacting these very statutes, Congress made unambiguous findings of precisely such a nexus. In fact, there is no shortage of legislative materials identifying the abundant effects of gun possession on interstate commerce. And, in any event, there is ample evidence that at some point in time nearly all guns travel in interstate commerce.

More than a quarter century ago, Congress enacted the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (1968). Title VII of the Act, entitled "Unlawful Possession or Receipt of Firearms," included the following specific findings regarding gun possession:

> The Congress hereby find[s] and declares that the receipt, possession, or transportation of a firearm by felons, veterans who are other than honorably discharged, mental incompetents, aliens who are illegally in the country, and former citizens who have renounced their citizenship, constitutes . . . (1) a burden on commerce or threat affecting the free flow of commerce.

Id. § 1201. In *United States v. Bass,* this Court recognized the validity of these findings and their significance:

> The Government argues that these findings would have been "wholly unnecessary" unless Congress intended to prohibit all receipts and possessions of firearms by felons. But these findings of "burdens" and "threats" simply state Congress's view of the constitutional basis for its power to act; the findings do not tell us how much of Congress's perceived power was in fact invoked. *That the findings in fact support a statute broader than the one actually passed* is suggested by the fact that "in commerce or affecting commerce" does not appear at all in the introductory clause to the "findings," even though § 1202(a) con-

> tains the phrase and concededly reaches only transportation "in commerce or affecting comerce."

404 U.S. at 345-46 n.14 (emphasis added). While the Court found that Section 1202 as written required a prosecutor to prove a connection to interstate commerce for an individual conviction, the Court indisputably recognized that Congress had made findings that would have supported a statute prohibiting the mere possession of guns by dangerous classes of people.[9] The suggestion of the court below that Congress has never made such findings is simply erroneous.[10] *Lopez*, 2 F.3d at 1352, 1368.

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[9] The Court in *Bass* did not reach the question of whether, even in the presence of these findings, Congress could constitutionally punish the possession of firearms. *Bass*, 404 U.S. at 339 n.4. However, the Court's acknowledgment that the findings would have supported broader legislation suggests the likely result.

[10] With the Firearms Owners' Protection Act of 1986, Pub. L. No. 99-308, 100 Stat. 449 (1986), the substantive portions of Title VII were incorporated into Section 922 (part of Title IV of the 1968 Act), and Title VII was repealed. Contrary to the Fifth Circuit's suggestion, *see Lopez*, 2 F.3d at 1352, this repeal did not constitute a rejection of the findings contained in the original Section 1201. The legislative history of the 1986 Act makes this clear:

> A second major change incorporated in section 102, creates a coordinated and consistent definition of persons prohibited from possessing, transporting, and receiving firearms. Existing law is deficient in that 18 U.S.C. section 922 defines four classes of persons forbidden firearms receipt, while section 1202 defines six classes—only two of which resemble section 922's categories—of persons forbidden firearm possession and transportation. . . .
>
> S. 1030 replaces these inconsistent rules with a straightforward and consistent one. . . . [S]ections 102 (f) and (g) amend 18 U.S.C. section 922 *to prohibit firearm possession*, receipt or transportation by convicted felons, fugitives from justice, users of certain drugs, persons subject to an adjudication as a mental defective or a commitment order, illegal aliens, those who have received a dishonorable discharge, and those who have renounced their citizenship.

S. Rep. No. 476, 97th Cong., 2d Sess. 19 (1992) (emphasis added).

Congress's findings that the possession of guns by a class of individuals affects interstate commerce are significant both in this case and for other crime legislation. These findings, as upheld by this Court, indisputably show that Congress has the power to regulate gun possession. These and other legislative findings also demonstrate that Congress perceived that it has the constitutional authority to prohibit gun possession by groups likely to commit gun-related crimes. This view is manifest in the findings enacted in conjunction with Title IV of the 1968 Act.

> [T]he ease with which any person can acquire firearms other than a rifle and shotgun (including criminals, *juveniles without the knowledge or consent of their parents or guardians,* narcotics addicts, mental defectives, armed groups who would supplant the functions of duly constituted public authorities, and others whose possession of such [firearms] is similarly contrary to the public interest) is a significant factor in the prevalence of lawlessness and violent crime in the United States.

18 U.S.C. § 921 note (emphasis added).

Subsequent legislation, while emphasizing the rights of law-abiding individuals to use guns for lawful purposes, also has stressed that gun possession by criminals must be controlled. *See* the Gun Control Act of 1968, Pub. L. No. 90-618, § 101, 82 Stat. 1214 (1968) (codified at 18 U.S.C. § 921 note) (purpose of Act to fight "crime and violence," not to place restrictions on law-abiding citizens); the Firearms Owners' Protection Act of 1986, Pub. L. No. 99-308, § 1(b)(2), 100 Stat. 449 (1986) (codified at 18 U.S.C. § 921 note) (same). Thus, where gun possession by categories of people may have a tendency to lead to crime, Congress has determined that it may prohibit such possession pursuant to its power under the Commerce Clause.

Two federal courts of appeals have held that federal legislation regulating the possession of guns may be en-

acted pursuant to the Commerce Clause. Both *United States v. Hale*, 978 F.2d 1016, and *Evans*, 928 F.2d 858, rejected Commerce Clause attacks on 18 U.S.C. § 922(o), which prohibits possession of a machine gun. The *Evans* opinion explained that the statute "easily" fit within Congress's commerce power because: "Congress specifically found that at least 750,000 people had been killed in the United States by firearms between the turn of the century and the time of the Act's enactment. It was thus reasonable for Congress to conclude that the possession of firearms affects the national economy, if only through the insurance industry." 928 F.2d at 862.

In *Hale*, the Eighth Circuit cited both the reasoning in *Evans* and the congressional findings in the 1968 Act as bases for upholding Section 922(o). 978 F.2d at 1018. In fact, aside from the decision below, no federal appeals court has ever overturned a gun possession statute on the grounds that it exceeded Congress's power under the Commerce Clause.

It is also significant that virtually all guns travel in interstate commerce. The House Judiciary Committee recently issued a report to accompany H.R. 3098 acknowledging that fact: "The Congress finds and declares that . . . even before the sale of a handgun, the gun, its component parts, ammunition, and the raw materials from which they are made have considerably moved in interstate commerce." H.R. Rep. No. 389, 103d Cong., 1st Sess., at 1 (1994).

This is not the first time that Members of Congress have recognized that nearly all guns, or at least their component parts, have at one time moved in interstate commerce. Senator D'Amato has reported that 96 percent of firearms travel through interstate commerce. 137 Cong. Rec. S8667 (daily ed. June 26, 1991) (statement of Sen. D'Amato).[11]

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[11] The legislative history of the Gun Control Act of 1968 recognized the degree to which guns travel across state lines, citing

These findings and statistics bring the regulation of gun possession squarely within the commerce power. *See Perez*, 402 U.S. at 154 ("[w]here the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class") (emphasis in original) (quoting *Maryland v. Wirtz*, 392 U.S. 183, 193 (1968)).

Although the Fifth Circuit's decision in *Lopez* does not ultimately hold that all federal laws regulating the possession of guns are unconstitutional, the thrust of its opinion suggests just that. As the Eighth and Ninth Circuits have recognized, federal legislation regulating the possession of guns is within Congress's Commerce Clause power. If this Court were to adopt the Fifth Circuit's reasoning in this regard, it would adversely affect a wide range of federal crime legislation, both existing and proposed, that is designed to deal with the overwhelming national problem of gun-related crime—a devastating phenomenon with grave and substantial effects on interstate commerce.

C. The Possession of Guns in Schools Substantially Affects Interstate Commerce.

The National Crime Survey, released by the Department of Justice in 1991, catalogued the problem of guns in schools and the deadly symbiotic relationship between drugs, gangs and guns. Nearly three million thefts and violent crimes occur at or near schools every year. About half of all violent crimes against young people between the ages of 12-19 occur in school buildings, on school property, or on adjacent streets. Twelve percent of the violent crimes in school buildings, according to the survey, involve an offender with a weapon. Catherine J. Whitaker,

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testimony "documenting the fact that the purchase of . . . firearms by persons in other than their residence State is a serious contributing factor to crime," and that "large numbers of criminals and juveniles have availed themselves of this source of firearms . . . ." S. Rep. No. 1501, 90th Cong., 2d Sess. 24 (1968).

Ph.D. & Lisa D. Bastian, *Teenage Victims, A National Crime Survey Report*, U.S. Department of Justice, May 1991, NCJ-128129.

On November 19, 1993, the Senate passed legislation that would amend Section 922(q) to include, *inter alia*, the following findings:

> (C) firearms and ammunition move easily in interstate comerce and have been found in increasing numbers in and around schools, as documented in numerous hearings in both the Judiciary Committee of the House of Representatives and Judiciary Committee of the Senate;
>
> (D) in fact, even before the sale of a firearm, the gun, its component parts, ammunition, and the raw materials from which they are made have considerably moved in interstate commerce;
>
> (E) while criminals freely move from State to State, ordinary citizens and foreign visitors may fear to travel to or through certain parts of the country due to concern about violent crime and gun violence, and parents may decline to send their children to school for the same reason;
>
> (F) the occurrence of violent crime in school zones has resulted in a decline in the quality of education in our country;
>
> (G) this decline in the quality of education has an adverse impact on interstate commerce and the foreign commerce of the United States.

Violent Crime Control and Law Enforcement Act of 1993, H.R. 3355, 103d Cong., 1st Sess. § 2972 (*reprinted* as amended by the Senate at 139 Cong. Rec. S17,153-54 (daily ed. Nov. 24, 1993)); *see also* 139 Cong. Rec. S16,301 (daily ed. Nov. 19, 1993) (passage of Act by Senate). Given the deference accorded Congress when it makes specific findings in support of a statute's constitu-

tionality, there should be no question about the constitutionality of Section 922(q).[12]

Beyond the obvious importance of an educated populace to the national economy [13] and the fact that nearly all guns, including those around schools, have traveled through interstate commerce, there are at least three ways in which the possession of guns on or near school grounds affects interstate commerce. First, business location and expansion decisions invariably involve consideration of the quality of local education, including the level of violent crime in schools. Second, interstate commerce is substantially affected by juvenile violence—and eliminating guns from schools is a rational step in dealing with this problem. Finally, there is a clear connection between the presence of firearms in and around schools and the sale of drugs.

Violence in schools has a significant impact on business decisions. *See* 138 Cong. Rec. S12,459 (daily ed. Aug. 12, 1992) (statement of Sen. Bradley) ("[M]any businesses interested in relocating to distressed areas will find the crumbling infrastructure of those cities to be a disincentive . . . ."). In 1979, the Subcommittee on Fiscal and Intergovernmental Policy of the Joint Economic Committee of Congress commissioned a study on the major problems facing central city businesses. Subcommittee on Fiscal and Intergovernmental Policy of the Joint Economic Committee: Congress of the United States, 95th Cong., 2d Sess., Central City Businesses—Plans and Problems (Comm. Print 1979). The study concluded that when businesses decide whether to relocate, alter the size of their work force or expand their operations,

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[12] That these findings post-date the Act is of no significance because it was unnecessary for Congress to have supported the statute with findings at all. What these findings summarize and demonstrate, regardless of their timing, is the clear Commerce Clause basis for the legislation.

[13] The importance of an educated populace to the national economy is discussed in detail in the brief for the United States.

they are more concerned with a location's quality of life than its tax rates, business costs and labor factors. *Id.* at 3. The study further concluded that *the number one perceived disparity between cities with the most favorable business climate and those with the least favorable was the quality of a city's schools. Id.* The substantial connection between gun possession in schools and commerce could not be more clear.

Beyond the importance of safe schools, Congress has recognized that juvenile crime—particularly where firearms are involved—has a significant effect on interstate commerce. For instance, the House Select Committee on Children, Youth, and Families held hearings on the issue of children and guns that demonstrated how the increase in firearm possession by juveniles has affected the health care and health insurance industries. *See Children and Guns: Hearings before the House Select Committee on Children, Youth, and Families*, 101st Cong., 1st Sess. 2, 5, 82 (1989) (statements of Rep. Miller and Thomas Scalea, M.D.).[14] While regulating the possession of guns in the immediate area of a school will not entirely solve the problems brought about by juvenile possession of guns, such regulation is logical. *See generally Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955) (rational for legislature to proceed step by step in addressing problems).

A final, striking way in which possession of guns in and around schools implicates interstate commerce is the connection between gun possession and drug sales. According to the Center to Prevent Handgun Violence, 18 percent of all weapons in school incidents are drug- or gang-related. A report from the Bureau of Justice Statistics indicates that more than 13 percent of convicted offenders held in

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[14] Congressional findings made in conjunction with Title IV of the 1968 Act specifically identify juvenile access to firearms as a "significant factor in the prevalence of lawlessness and violent crime in the United States." 18 U.S.C. § 921 note. Thus, to the extent that crime itself affects interstate commerce, juvenile gun possession makes a particularly strong contribution.

local jails in 1989 claimed they had committed their offense for money to support a drug habit. Eighteen percent of those surveyed admitted to being under the influence of a drug at the time of the offense. *Children Carrying Weapons*, at 36 (statement of Ronald D. Stephens).

Congress's power under the Commerce Clause to regulate activities related to the possession and sale of drugs is well recognized. *See, e.g., United States v. McDougherty*, 920 F.2d 569, 572 (9th Cir. 1990), *cert. denied*, 499 U.S. 911 (1991); *United States v. Lopez*, 459 F.2d 949, 951-53 (5th Cir.), *cert. denied*, 409 U.S. 878 (1972). In 1989, the House Select Committee on Children, Youth, and Families was told that an estimated "40 percent of the violence that we see in people under 25 years of age is drug-related violence." *Children and Guns*, at 81 (statement of Thomas Scalea, M.D.). The relationship between drugs, guns and juveniles was recently discussed in detail in connection with House bill 3098 and Senate bill 1087. If enacted, these bills would amend Section 922 to prohibit the possession of handguns or handgun ammunition by juveniles (with certain limited exceptions). Specific "Findings and Declarations," contained in each bill, state:

> Just as the hardened drug kingpins begin their life in the illicit drug culture by exposure to drugs at a young age, violent criminals often start their criminal careers on streets where the ready availability of guns to young people results in the acceptability of their random use. . . . Violent crime and the use of illicit drugs go hand-in-hand, and attempts to control one without controlling the other may be fruitless.

H.R. 3098, 103d Cong., 1st Sess. (1993); S. 1087, 103d Cong. 1st Sess. (1993).[15]

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[15] These bills were both passed in their respective Houses. *See* 139 Cong. Rec. H10,314-19, H10,404 (daily ed. Nov. 20, 1993); 139 Cong. Rec. S15,412-25 (daily ed. Nov. 9, 1993). Thus, each House of Congress has voted to approve the findings. Both bills are currently being incorporated into more sweeping crime legislation.

In fact, contrary to the Fifth Circuit's suggestion that the Gun-Free School Zones Act's legislative history does not reflect a commerce nexus, the relationship between guns, drugs and schools was discussed in the hearings leading to the Act:

> I'd like to add here that what we are seeing in the city of Cleveland is an acceleration of violence, not only by juveniles but by young people up to the age of 21 who are banding together and forming gangs and trying to take control of drug trafficking. And since these young people hang out primarily in the playgrounds around the schools, and have members that are attending schools, the incidence of weapons in the schools has risen . . . .

The Gun-Free School Zones Act of 1990: Hearing Before the Subcommittee on Crime of the House Committee on the Judiciary, 101st Cong., 1st Sess. 26-27 (1990) (statement of Edward Kovacic). The Senate Judiciary Committee heard similar testimony:

> The gang factor has become an ever-increasing flow on the proliferation of both drugs and gangs in our schools. The primary source of income for most gangs is trafficking of drugs. As street narcotic enforcement programs become more effective, we force gang members to distribute narcotics in schools. Children of all ages are used to further this purpose. . . . Recruitment is achieved through offering children incentives that they perceive are lacking in their homes. If this cannot be accomplished, it is often then done through fear and intimidation. . . . With controlling the flow of weapons and drugs into the schools, we can lessen their influence in the school environment.

See Children Carrying Weapons: Why the Recent Increase: Hearing Before the Senate Committee on the Judiciary, 102d Cong., 2d Sess. 23 (1992) (statement of Lt. Thomas Byrne). A student essay read at the Senate hearing reported that approximately 50 percent of the students in one school carried weapons to school and that

most handguns are carried by student drug dealers. *Id.* at 34. Even the decision below acknowledged that Congress's commerce power supports legislation controlling the possession and sale of drugs. *See Lopez*, 2 F.3d at 1366-67 n.50. Because it is simply undeniable that weapons are being carried into schools to support the drug trade, the constitutionality of Section 922(q) could rest on this factor alone.

One federal appeals court decision and three federal district court decisions have recognized the nexus between commerce and the possession of guns in schools and, therefore, have upheld the constitutionality of Section 922(q).[16] Three courts rested their decisions on the general link between commerce and the possession of firearms. *United States v. Edwards*, 13 F.3d at 294; *United States v. Ornelas*, 841 F. Supp. at 1092 and *United States v. Holland*, 841 F. Supp. at 144. The other court specifically discussed the connection between guns, drugs and gangs. *United States v. Glover*, 842 F. Supp. at 1336-37. The adverse effect that gun violence in the schools has on business relocation decisions represents yet another substantial connection to interstate commerce. *See supra* at 21. Regulation of the possession of guns in and around schools has a clear nexus to interstate commerce concerns and, therefore, Section 922(q) should be upheld.

III. CONGRESS HAS BROAD AUTHORITY TO REGULATE PRIVATE ACTIVITIES AFFECTING INTERSTATE COMMERCE.

The Fifth Circuit applied the wrong standard when it analyzed the Tenth Amendment challenge to the Gun-Free School Zones Act. The opinion below cited *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), for the proper standard to determine whether the Tenth Amendment bars the federal regulation at issue.

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[16] *But see United States v. Trigg*, 842 F. Supp. 450 (D. Kan. 1994); *United States v. Morrow*, 834 F. Supp. 364 (N.D. Ala. 1993).

See Lopez, 2 F.3d at 1366. In doing so, the court incorrectly treated the Act as a law regulating the states *qua* states. The Act, however, applies only to "persons." *See* 18 U.S.C. §§ 921(a)(1), 922(q)(1). The statutory definition of person, "any individual, corporation, company, association, firm, partnership, society, or joint stock company," does not include states. *Id.* § 921(a)(1). In fact, nowhere does the Act subject states to regulation.

This Court consistently has distinguished Congress's power to regulate private behavior, which does not raise Tenth Amendment questions, from Congress's power to regulate a state's activities, which does raise them. In *Hodel*, this Court rejected as "incorrect" the assumption that "the Tenth Amendment limits congressional power to pre-empt or displace state regulation of private activities affecting interstate commerce." 452 U.S. at 289.[17] Quite simply, the Commerce Clause empowers Congress to displace all state regulation of private activities affecting interstate commerce. *See, e.g., Campbell v. Hussey*, 368 U.S. 297 (1961).

Thus, a federal statute displacing even a state's exercise of police powers does not offend the Tenth Amendment. *See, e.g., United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942); *United States v. Darby*, 312 U.S. at 113-14; *United States v. Carolene Products Co.*, 304 U.S. 144, 147-48 (1938); *Hoke v. United States*, 227 U.S. 308, 320-23 (1913); *Athanasaw v. United States*, 227 U.S. 326 (1913). Nor would any adverse impact on state and local economies from the federal regulation of private activities raise Tenth Amendment concerns. *See, e.g., Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 534-35 (1941). Similarly, the fact that the Act here does not foreclose

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[17] In that case, the Commonwealth of Virginia, a town in Virginia, and several private parties engaged in surface coal mining claimed that the federal statute violated the Tenth Amendment by interferring with the state's ability to exercise its police power over land uses. *Id.*

all state involvement in regulating the private activity—individual possession of guns around schools—does not raise Tenth Amendment concerns. *See Hodel*, 452 U.S. at 290. Congress's power to pass such legislation is not diminished "simply because [it] chose to allow the States a regulatory role." *Id.*

The only limit on Congress's authority to regulate private activities under the Commerce Clause is "the requirement that 'the means chosen by [Congress] must be reasonably adapted to the end permitted by the Constitution.'" *Id.* at 286 (quoting *Heart of Atlanta Motel v. United States*, 379 U.S. at 262).[18] Moreover, the manner of regulation chosen by Congress need not be the approach that a court would have taken; it just cannot be irrational. *See Heart of Atlanta Motel*, 379 U.S. at 261 ("It may be argued that Congress could have pursued other methods to eliminate the obstructions that it found in interstate commerce. . . . But this is a matter of policy that rests entirely with the Congress not with the courts."). In this case, because Congress's purpose for passing the Act—ending violent crime in and around schools—is both within its Article I powers and rationally related to the terms of the statute, that should be the end of the Tenth Amendment inquiry.

Even if the Court were to subject the Gun-Free School Zones Act to a Tenth Amendment inquiry, the Act would be constitutional. *See Garcia*, 469 U.S. at 554 ("[W]e are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is one of process rather than of result."). Moreover, even where this Court has

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[18] In other words, the proper test for determining the Act's constitutionality under the Tenth Amendment is whether Congress had a "rational basis" for finding that gun possession in and around schools affects interstate commerce. *See Hodel*, 452 U.S. at 283-93 (holding federal regulation of the use of private lands does not violate the Tenth Amendment under the rational basis test despite intrusion on state regulation of the lands).

held that a federal law violates the Tenth Amendment, *see National League of Cities v. Usery*, 426 U.S. 833, 840 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth., supra*, the Tenth Amendment's protection has not covered private activities.[19] Although this Court overturned *National League of Cities* in *Garcia*, nothing in *Garcia* suggests that the requirement that the federal law regulate states as states to implicate the Tenth Amendment is eroneous. 469 U.S. at 537-38.

CONCLUSION

For all the foregoing reasons, Congress acted constitutionally and within its commerce power when it passed the Gun-Free School Zones Act. This Court should reverse the decision of the Fifth Circuit in *United States v. Lopez*, 2 F.3d 1342 (5th Cir. 1993).

Respectfully submitted,

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[19] In *National League of Cities*, the Court emphasized that different constitutional considerations are implicated when Congress regulates states rather than private entities: "It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside. It is quite another to uphold a similar exercise of congressional authority directed, not to private citizens, but to States as States." *National League of Cities*, 426 U.S. at 845.